93-930

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOHN LUMLEY,

Petitioner,

vs.

DIANA HOGSETT and DANIEL REWERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE A. SALZBURG
Counsel of Record for Petitioner
HERSCHLER, FREUDENTHAL, SALZBURG, BONDS & RIDEOUT, P.C.
314 East 21st Street
Cheyenne, Wyoming 82001
(307) 634-2240

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

WHETHER A NEWLY-ELECTED COUNTY SHERIFF IS REQUIRED BY THE FIRST AMENDMENT'S GUARANTY OF FREEDOM OF POLITICAL ACTIVITY AND EXPRESSION TO APPOINT HIS POLITICAL OPPONENT AS A DEPUTY SHERIFF WITHIN HIS ADMINISTRATION?

WHETHER A NEWLY-ELECTED COUNTY SHERIFF IS REQUIRED BY THE FIRST AMENDMENT'S GUARANTY OF FREEDOM OF POLITICAL ASSOCIATION TO APPOINT AS A DEPUTY A PERSON WHO, PRIOR TO THE ELECTION, HAS SUPPORTED HIS OPPONENT AND STATED THAT HE IS UNQUALIFIED TO HOLD THE OFFICE?

WHETHER SPEECH BY A DEPUTY SHERIFF, WHO IS ENGAGED IN A POLITICAL CAMPAIGN AGAINST THE SITTING SHERIFF, WHICH IS DIRECTLY CRITICAL OF THE SITTING SHERIFF'S ADMINISTRATION, IS PROTECTED BY THE FIRST AMENDMENT?

WHETHER A NEWLY-ELECTED COUNTY SHERIFF IS ENTITLED TO QUALIFIED IMMUNITY IN A CASE INVOLVING THE FAILURE TO APPOINT OR REAPPOINT DEPUTY SHERIFFS FOR REASONS RELATED TO THEIR POLITICAL ACTIVITIES?

PARTIES

John Lumley, Petitioner v. Diana Hogsett and Daniel Rewers, Respondents. The Board of County Commissioners, Hot Springs County, Wyoming, and Deloyd Quarberg were additional defendants at trial, but were not parties to the appeal, nor are they parties to this Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John Lumley ("Lumley") respectfully prays that a writ of certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit, entered on August 27, 1993, affirming the judgment of the United States District Court for the District of Wyoming entered upon a jury verdict. The judgment imposed liability upon Lumley for failing to appoint a civilian employee of the prior sheriff as a sworn deputy within his administration, and failing to reappoint the Captain and second-in-command of the prior sheriff on grounds, *inter alia*, related to their prior political activities.

OPINION BELOW

The Opinion of the United States Court of Appeals, reproduced in the Appendix at A-1 through A-6, is unpublished and, pursuant to 10th Cir. R. 36.3, has no precedential value.

The Order of the Court of Appeals denying rehearing is reproduced as Appendix A-7 through A-8.

The Amended Judgment of the United States District Court for the District of Wyoming is reproduced as Appendix A-9 through A-11.

JURISDICTION

The Order and Judgment of the Court of Appeals was entered on August 27, 1993. A Petition for Rehearing with Suggestion for Rehearing En Banc was filed on September 7, 1992, and denied by Order entered on September 30, 1993. Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Deloyd Quarberg was elected Sheriff of Hot Springs County, Wyoming, in 1982. In 1984, he appointed Respondent Daniel Rewers ("Rewers") to the position of deputy sheriff. Rewers was promoted to the position of undersheriff and second-in-command of the Department by October of 1984.

In the election campaign of 1986, Quarberg's opponent publicly announced that if he were elected, he would not retain Rewers in his administration. At that time, Rewers was aware of this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976),[1] and he therefore approached Quarberg with a request that his position be changed by deleting his "policymaking" authority. By so doing, Rewers felt that if Quarberg were not successful in his reelection bid, his position would be secure. Therefore, the position of undersheriff was abolished, and the position of Captain created. Rewers remained as the Sheriff's second-in-command in the Department.

Quarberg was reelected in 1986.

By 1988, the relationship between Quarberg and Rewers had deteriorated with neither trusting the other. As a result of investigations conducted in late 1988 and throughout 1989, by late 1989 Quarberg was poised to discharge Rewers for misconduct. Prior to any disciplinary action being taken against Rewers, in January of 1990, Rewers announced his

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[1] Rewers was aware of the *Elrod* decision as a result of a seminar he had attended, and the fact that prior to his employment in Wyoming, he was employed as an officer in Sheriff Elrod's department, in Chicago.

intention to run for the office of Sheriff against Quarberg. The timing of Rewers' announcement was due, in part, to his knowledge that if Quarberg discharged him, it would appear to be political retaliation.

During this time period, Sheriff Quarberg had personnel policies, including a policy modeled after the Hatch Act, which forbade a deputy from running for partisan political office while holding his appointment. After Rewers announced for the office of Sheriff, the only other supervisory deputy in the department, Richard Fairburn, decided that he would also like to run for the office. Rewers and Fairburn wrote to the Wyoming Secretary of State, the State's chief elections officer, urging that the Sheriff's policy which prohibited running for partisan office violated the State's election code. In response to that assertion, Quarberg agreed that both Rewers and Fairburn could run for Sheriff against him while retaining their appointments as his deputies and supervisors of the patrol and detention divisions of his office.

In the August 1990 republican primary election, Fairburn defeated Quarberg, while Rewers won the democratic primary.

After Quarberg's defeat, Lumley, who was employed by the Sheriff as a civilian investigator[2], decided to also run for the office as an independent candidate.

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[2] Lumley was rendered paraplegic as a result of a high school automobile accident. He is therefore ineligible to be certified under State law as a peace officer, and could not serve as a sworn deputy sheriff. However, the certification requirement does not apply to Sheriffs, who are elected officials.

From August of 1990 through the November general election, Quarberg was the "lame duck" Sheriff, while the two supervisory deputies and a civilian investigator ran against each other. The Sheriff's Department at that time consisted of the Sheriff, five deputies assigned to the jail, three deputies assigned to patrol, the civilian investigator, a civilian civil process server, and a secretary.

In his campaign in a time of limited County resources, Lumley promised to reduce costs in the Sheriff's office, including abolishing the position of civil process server, because patrol deputies could serve civil process while on routine patrol. Because of the imminent loss of her employment, the civil process server, Respondent Diana Hogsett ("Hogsett"), applied to all three candidates to be appointed as a sworn deputy in the detention center. Fairburn allegedly declined to consider her because she was female. Rewers promised to appoint her. Lumley advised that he had "no problem" with her moving to the sworn deputy position.

During the campaign, Hogsett approached Lumley and advised that she supported the candidacy of Rewers, because she felt that Lumley was not qualified to hold the office of Sheriff.

Lumley won the general election and took office in early January of 1991. On the day he took office, he reappointed most of Quarberg's deputies, but declined to reappoint Rewers, Fairburn and another deputy. Further, he abolished the position of civil process server, and declined to appoint Hogsett to the position of detention deputy.

Hogsett and Rewers filed suit against Lumley, Quarberg and the Board of County Commissioners, alleging various claims under both State and Federal law. Original federal jurisdiction was based upon 28 U.S.C. § 1343(1), and other statutes. At issue in this Petition are Respondents' claims brought pursuant to 42 U.S.C. § 1983 asserting that Lumley's failure to appoint Hogsett to the position of deputy sheriff, and failure to reappoint Rewers to the position of Captain, was based upon their exercise of rights guaranteed under the First Amendment. In particular, Hogsett asserted that Lumley's decision not to appoint her was in retaliation for her association with and support of Rewers in his candidacy. Rewers asserted that Lumley's decision not to reappoint was based upon his political candidacy, as well as certain speech which he had uttered which was critical of both Quarberg and Lumley.[3] Finally, both Respondents claimed that the failure to appoint them violated their

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[3] In particular, Rewers alleged that Lumley's decision not to reappoint was based upon his prior statements that Quarberg was not a "full-time" sheriff because he also owned a farm; that Quarberg wasted the County's money by purchasing a one-ton pickup truck and duplicating undercover drug investigations being conducted within the County by the State's Division of Criminal Investigation; and that Lumley was unqualified to be an investigator. Quarberg and Lumley, on the other hand, asserted that they objected to Rewers' "bad mouthing" the Sheriff both within the office to other employees, and to citizens in the County, because such comments were inconsistent with Rewers' obligations as second-in-command to support the Sheriff's policies. The record is unclear when the allegedly protected speech was uttered, but the speech apparently was uttered during the time Rewers decided to run, and began his campaign for Sheriff.

rights to due process of law under the Fifth and Fourteenth Amendments in that Lumley did not give them notice and hearing prior to his decisions.

Lumley denied the First Amendment allegations, and asserted that his decisions were supported by reasons unrelated to Respondents' political activities.[4] Lumley further asserted that Respondents did not have a "protected property interest" in their employment as a matter of law.

Lumley also asserted that he was entitled to qualified immunity on the claims asserting political retaliation in violation of the First Amendment; however, a Motion for Summary Judgment on that basis was denied without explanation.

At the close of the plaintiffs' case, the trial court granted the Board of Commissioners' Motion for Judgment as a Matter of Law, and all claims against the Board were dismissed. After trial, the jury found in favor of Quarberg on all claims, and in favor of Lumley on claims asserting a state law breach of contract, gender discrimination, Fair Labor Standards Act violations and State constitutional claims. However, the jury found in favor of

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[4] *See Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). In particular, Lumley asserted that the civil process position was abolished as a cost saving measure, and he declined to appoint Hogsett as a deputy because of observed performance deficiencies while she served in that capacity. Lumley testified that Rewers was not retained for various reasons, including that he lied about his location while on patrol, and had stolen County funds by padding his expense vouchers. The explanations offered in support of the decisions were unrebutted.

Respondents on their First Amendment claims, as well as claims asserting a deprivation of procedural due process. The jury assessed money damages in the amount of $84,950 for Rewers, and $32,600 for Hogsett.

A posttrial Motion for Judgment as a Matter of Law by Lumley was denied, and the case appealed to the Court of Appeals. Raised in the Court of Appeals were a variety of errors committed by the trial court in instructing the jury regarding rights protected by the First Amendment, including both rights to free speech, and to political conduct. Also raised were errors relating to the trial court's failure to decide that Respondents lacked the requisite protected property interest to support their due process claims. Finally, Petitioner challenged the trial court's submission of the qualified immunity defense to the jury as a question of fact.

The Court of Appeals' decision affirmed the judgment below in all respects. First, the Court noted that whether or not it was appropriate for the trial court to submit the requisite balancing of Respondents' First Amendment rights against the rights of a public employer to the jury, where the jury's decision was correct, there was no reversible error. Appendix, p. A-4. Second, while the Court agreed that the trial court's handling of the due process claims may have created "problems," it held that the First Amendment claims alone would support the judgment. *Id.* The Court further agreed that it was error to submit the qualified immunity issue to the jury as a question of fact, but held that the jury's decision was correct, so that no reversible error was committed. Appendix, p. A-5. Thus, the judgment in this case depends entirely upon the propriety of the trial

court's instructions on the Respondents' First Amendment claims, as well as Petitioner's qualified immunity claim.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals holding that the failure to appoint or reappoint a person to the position of deputy sheriff due to combative political activity squarely conflicts with the decisions of at least three other Circuit Courts of Appeals.

The decision of the Court of Appeals affirming the trial court's instructions regarding Respondent Rewers' free speech claims conflicts with established precedent of this Court.

The decision of the Court of Appeals holding that Lumley was not entitled to qualified immunity on Respondents' claims based on 42 U.S.C. § 1983 conflicts with established Supreme Court precedent.

I. The Court of Appeals' Decision Conflicts With the Decisions of Other Circuits.

This Court has directly addressed the question of denial of public employment based upon political conduct on three occasions. In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held that civilian employees of the Cook County, Illinois, Sheriff's Department could not be replaced merely because of their political party affiliation unless the particular employee held a policymaking position.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court clarified the *Elrod* holding, noting that the question is not necessarily whether the individual holds a "policymaking" or "confidential" position, but whether political affiliation and beliefs are appropriate considerations for the effective performance of the public employee's duties.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), this Court held that low level public employee promotions, transfers and recalls after layoff could not be based merely upon political affiliation.

In the wake of these decisions, the lower courts struggled with the determination of which public employees held positions which were within or without the holdings, and in particular, whether deputy sheriffs are employees for whom political considerations are appropriate in the appointment calculus. In making these determinations, the courts have been confronted with differing levels of political conduct, which has led to differing results.

Following *Elrod*, at least two Courts of Appeal have held that mere affiliation with a particular political party is not a legitimate consideration in determining whether a deputy sheriff should be reappointed by a newly elected sheriff. *See Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984) (but reserving question whether active political support for an opponent may be considered); *Burns v. County of Cambria*, 971 F.2d 1015 (3rd Cir. 1992).

The Seventh Circuit has held to the contrary, stating that sheriff's deputies, especially in small counties, are within the class of public employees whose political beliefs and activities may properly be considered by the

sheriff in deciding whether to retain them as deputies. *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied sub nom Thulen v. Bausman*, ___ U.S. ___, 112 S.Ct. 1262 (1992).

Beyond mere party affiliation is the active support of the sheriff's opponent, or refusal to support the sitting sheriff, in a campaign, and on this question the Circuits have split. *See Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987) (sheriff's patrol captain may be discharged for actively supporting the sheriff's opponent in a political campaign, answering the question left open in *Jones v. Dodson, supra*); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied* 456 U.S. 925 (1982) *modified on other grounds* 809 F.2d 1151 (5th Cir. 1988) (merely campaigning for sheriff's opponent not grounds for discharge of a deputy sheriff); *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988) (same, but statements which impugn integrity and ability of sheriff are grounds for discharge); *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993) (deputy may be discharged for refusal to campaign for sheriff's reelection); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989) (deputy who actively supports sheriff's opponent subject to termination).

Additionally, the Tenth Circuit has held that support of the previous sheriff cannot be grounds for a newly elected sheriff to discharge employees who were not deputy sheriffs. *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988).

Finally, two Circuits have addressed the question of a deputy running for office against the sitting sheriff. In *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), the trial

court had dismissed the claim of a sheriff's lieutenant who was discharged for running for office. The appellate court remanded the case for development of a factual record without reaching the merits of the constitutional question presented. In *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993), the court recognized a sheriff's right to demand loyalty from his deputies, and that the declaration of a deputy to run for office against the sheriff at the next election is "the height of disloyalty." 3 F.3d at 218-219. The Court held that discharge for this reason was permissible against the plaintiff's First Amendment challenge.

The Court of Appeals' decision in this case is the first to hold that a deputy sheriff has a right, protected by the First Amendment, to run for partisan political office against the sitting sheriff,[5] and that, in practical effect, a newly elected sheriff is constitutionally required to appoint his political opponent as his deputy.

With respect to the claim of Respondent Hogsett, another problem arises. Hogsett was employed as a civilian, civil process server, not a deputy sheriff. It is undisputed that the position which she held was abolished for budgetary reasons, and unrelated to her support or non-support of any particular candidate. Her claim below was

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[5] In *CSC v. Letter Carriers*, 413 U.S. 548 (1973), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) this Court upheld state and federal statutes which specifically prohibit such political activities by public employees against First Amendment challenges. Therefore, the holding that declining to reappoint a deputy for such political conduct violates the First Amendment is in conflict with these decisions. *See* Part II, *infra*.

that Lumley declined to appoint her as his deputy, a position which she did not previously hold, due to her stated support for Rewers' candidacy, and stated nonsupport for the candidacy of Lumley. Thus, Hogsett's claim is quite different than a claim of termination of existing employment.

In light of this difference, the Court of Appeals' decision that a newly elected sheriff is required by the First Amendment to appoint as his deputy one who has expressed no confidence in his ability to hold the office conflicts with controlling precedent from this Court.

In First Amendment speech and association cases, this Court has recognized the legitimate right of an elected official to demand loyalty of his appointees, and sharply distinguished between conduct which is protected, and that which is not. Thus, speech, the purpose of which was to "seek a vote of no confidence" in a supervisor, was held not protected in *Connick v. Meyers*, 461 U.S. 138, 152 (1983). A governmental employee's statements which contain a message of personal confrontation are likewise not protected insofar as they threaten institutional efficiency. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979).

Stated differently, Hogsett claims a First Amendment right, as an applicant for the position of deputy sheriff, to tell a candidate that she supports his opponent, and that he is unqualified to be sheriff, and after he is elected to demand appointment as his deputy. Quite simply, there is no law in support of such a proposition, and the Court of Appeals' decision is erroneous.

These same cases demonstrate that the Court of Appeals' decision with respect to Rewers' speech claim was incorrect. Statements by Rewers, uttered for the purpose of seeking a vote of no confidence in Quarberg, and later Lumley, are not protected as a matter of law. These kinds of statements demonstrate why a sheriff's Captain cannot be permitted to run for office while maintaining a position in which his obligations include loyalty to the sitting sheriff, and projection of the sheriff's competence to the county's citizens. *See Elrod, supra,* at 367 (A public employer has a legitimate interest in the political loyalty of its employees "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration."); *Upton v. Thompson, supra.*

Rewers claimed that the "protected speech" he uttered fell into three categories: that Quarberg owned a farm, and therefore did not devote his full time and attention to the office of Sheriff; that Quarberg wasted the County's funds by purchasing unnecessarily heavy pickup trucks, and by employing Lumley as a drug investigator; and that Lumley himself was unqualified to be employed as an investigator. Both Quarberg and Lumley asserted that they objected to Rewers' speech which was characterized as "bad mouthing;" that is, Rewers commonly referred to Quarberg around the office as "an idiot," a "son of a bitch," and stated that Quarberg "didn't know what he was doing." Lumley testified that if Rewers wanted to run for sheriff it was fine with him, but he should have quit rather than stay in his position as second-in-command, while simultaneously "tear[ing Quarberg] apart." Rewers asserted the "prerogative" to

say whatever he pleased, to whomever he pleased, whenever he pleased.

In sum, after running for sheriff on a platform which included overt statements of Lumley's lack of qualification to hold office, and espousing a philosophy which included the "right" to criticize the sheriff whenever he wished, Rewers asserts a First Amendment right to continued employment as Lumley's second-in-command which the Court of Appeals accepted.

The Court of Appeals' decision in this regard failed to recognize, or improperly applied, a critical consideration in such analyses. In addition to the requirement that protected speech be on a matter of public concern, *Connick v. Myers*, 461 U.S. 138, 146 (1983), the Court must also balance the employee's interest in uttering the speech against the employer's interest in curtailing it. *Id.*, at 149-151; *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Speech which creates "disruption of the office and the destruction of working relationships" is not protected. *Connick, supra*, at 151-152.

II. The Court of Appeals' Decision Denying Qualified Immunity Directly Conflicts with this Court's Prior Precedents.

Since this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity has been measured by a purely objective standard. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established or constitutional

rights of which a reasonable person would have known," *id.*, at 818, and "[f]or executive officers in general, . . . qualified immunity represents the norm." *Id.*, at 807. The right alleged to have been violated must have been clearly established in a "particularized" way, rather than generally, and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Prior to reaching the question of whether a constitutional right has been clearly established for qualified immunity purposes, it is appropriate to first determine whether the right allegedly violated has constitutional protection at all. *Siegert v. Gilley*, 500 U.S. ___, 114 L.Ed.2d 277 (1991).

Rewers' First Amendment allegation in this case was principally that Lumley declined to reappoint him to the position of Captain in retaliation for his having run for the office of Sheriff against Quarberg, first, and thereafter against Lumley. This Court has held that the Federal Hatch Act, and its State law counterparts, is constitutional in the face of First Amendment challenges. *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Because statutory and regulatory prohibitions against, *inter alia*, running for partisan political office do not violate the First Amendment's guarantees, it follows that Rewers' claim that his First Amendment rights were violated in this case states no

claim at all. *See Wilbur v. Mahan, supra,* at 219-220, Easterbrook, J. concurring.

The Court of Appeals decision in this case found that the trial court had erroneously submitted the qualified immunity to the jury for determination, but that the error was harmless because the jury's determination was correct. The Court of Appeals held that Respondents' rights had been clearly established in this Circuit by its decision in *Dickeson v. Quarberg,* 844 F.2d 1435 (10th Cir. 1988). This holding was error, and conflicts with the proper qualified immunity analysis set out in this Court's precedent.

Dickeson treated the question of whether a newly elected sheriff could terminate civilian employees for merely supporting the prior sheriff, and held that such conduct violated the First Amendment. In light of *Elrod, supra,* this holding is wholly unremarkable. However, neither the Tenth Circuit nor this Court has ever held that a sworn deputy sheriff has a First Amendment right to run for office against the sitting sheriff while keeping his appointment, nor that a civilian employee has a First Amendment right to be appointed as a sworn deputy after supporting the newly elected sheriff's opponent, and expressing nonsupport of the prevailing candidate. At the time of Lumley's decision in this case, two Courts of Appeals had addressed the issue, and found that a newly elected Sheriff was *not* required to appoint as his deputy those who did not support his candidacy. *Upton v. Thomas, supra; Terry v. Cook, supra.* Since that time, the Seventh Circuit has extended the holding to conduct

involving a deputy's candidacy for office against the sitting sheriff. *Wilbur, supra.*[6]

Thus, the Court of Appeals' decision in this case fails to properly consider the issue in the particularized fashion which this Court's precedents demand. First, the Court of Appeals' decision does not consider the differences between civilian employees and deputy sheriffs with respect to whether their duties fall within or without the *Elrod-Branti* standards. Second, the Court of Appeals' decision makes no distinction between mere party affiliation or political support, and the conduct at issue in this case.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals conflicts with the decisions of other circuits on the question of the appropriate limitations on political activity by governmental employees, in general, and by deputy sheriffs, in particular. The practical effect of the decision is that a newly elected sheriff is constitutionally required to appoint his political opponent to a position of authority in his administration, and to appoint an individual who supports the opponent, and does not support the sheriff, as a deputy. The ruling of the Court of Appeals on these questions is unprecedented. Further, the decision of the

[6] The varying decisions of the Courts of Appeals in a variety of factual circumstances are cataloged in *Rutan, supra,* at 111-112, Scalia, J. dissenting. The contrary results under various fact patterns demonstrates that little about the law in this area is "clearly established."

Tenth Circuit Court of Appeals affirms personal liability, in the face of a claim to qualified immunity, without proper analysis of the required showing of violation of "clearly established" rights. For these reasons, it is respectfully urged that this petition for certiorari should be granted.

BRUCE A. SALZBURG
(Counsel of Record)
HERSCHLER, FREUDENTHAL, SALZBURG
BONDS & RIDEOUT
314 East 21st Street
P.O. Box 387
Cheyenne, Wyoming 82003-0387

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DIANA HOGSETT and DANIEL REWERS,	)	
Plaintiffs-Appellees,	)	No. 92-8014
v.	)	(Nos. 91-CV-0069-B, 91-CV-0070-B)
JOHN LUMLEY	)	(D.WY.)
Defendant-Appellant.	)	

ORDER AND JUDGMENT*

(Filed Aug. 27, 1993)

Before LOGAN, Circuit Judge, RONEY, Senior Circuit Judge,** and SEYMOUR, Circuit Judge.

Diana Hogsett and Daniel Rewers obtained judgments for $32,600 and $84,950 respectively, after a jury verdict which found that defendant Sheriff John Lumley,

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for the purposes of establishing the doctrines of law of the case, res judicata or collateral estoppel. 10th Cir. R. 36.3.

** Honorable Paul H. Roney, Senior United States Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

in refusing them reemployment after he was elected sheriff, had retaliated against them for exercise of constitutionally protected rights, and had denied them due process of law. Lumley appeals, asserting three issues: erroneous instructions regarding (1) the First Amendment rights of a deputy sheriff, (2) the due process claims, and (3) failure to grant him qualified immunity on the ground that there was no clearly established law as to either the First Amendment claims or the due process claims. We affirm.

A brief review of the facts establishes the thrust of this litigation. This case stems from Lumley's refusal in January 1991, after he was elected Sheriff, to appoint Hogsett and Rewers, who had been employed by the predecessor Sheriff whom Lumley defeated, to positions in his administration. Neither plaintiff was given prior notice or an opportunity to contest this discharge, and they claimed that the policies of the previous sheriff, which were formally rescinded by Lumley four days after the decision, guaranteed them a right to a hearing before their employment could be terminated.

Both plaintiffs opposed Lumley's candidacy for sheriff. Rewers claimed that he was not reappointed as Captain, a non-policymaking position, because he ran against Lumley in the election and had uttered speech critical of the prior Sheriff's practices, speech which he claims was constitutionally protected. Hogsett, whose position as civil process server Lumley abolished, claimed that she was not appointed to the sworn position of detention deputy because she supported Rewers' candidacy. Lumley admitted that an important factor in his appointment decisions was loyalty to the Sheriff but stressed the

fact that questions existed as to the competence of both Hogsett and Rewers.

Although the plaintiffs, in addition to suing Lumley, also sued the prior Sheriff Quarberg and the Hot Springs Board of County Commissioners, the jury found for Quarberg, and the trial court dismissed the Board of County Commissioners as a matter of law. Neither are parties to this appeal.

Jury Instructions

Lumley claims various errors in the jury instructions. We have read the instructions and reviewed the record. Taken as a whole, the case was fairly presented to the jury on Hogsett's and Rewers' First Amendment and due process claims. There was no reversible error, *Shute v. Moon Lake Elec. Ass'n*, 899 F.2d 999, 1004 (10th Cir. 1990), and the jury was not misled, *Messina v. Kroblin Transp. Sys.*, 903 F.2d 1306, 1309 (10th Cir. 1990).

Specifically, as to the free speech issues, Lumley argues that the district court erroneously instructed the jury that Hodgett [sic] and Rewers had a First Amendment right to engage in political activity and express political opinions, that Rewers' speech was constitutionally protected, that it was the jury's responsibility to balance the respective interests of the parties, and that the defendant had the burden of proving the absence of less drastic means to achieve loyalty among his deputies.

The First Amendment instructions do not misstate the law. *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). They properly classify

Rewers' speech as protected and direct the jury to determine if Hogsett's and Rewers, discharges were due to protected First Amendment conduct. Furthermore, the balancing of the parties' interests is a central inquiry in a case such as this, *Dickeson v. Quarberg*, 844 F.2d 1435, 1440 (10th Cir. 1988). Whether or not that task was appropriately assigned to the jury, any error in that regard would not be reversible when the jury has implicitly reached the right result. *Wren v. Spurlock*, 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). The burden is correctly placed on the defendant to demonstrate that there is no less drastic means of satisfying its interests. *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

As to the due process issues, Lumley argues that the district court erred in submitting to the jury the question of whether Hogsett and Rewers had protected property interests in their employment, and in leaving to the jury's determination whether Quarberg's policy providing for termination hearings remained in effect until Lumley formally rescinded it or until his termination of Hogsett and Rewers impliedly voided it.

Although there may be some problems concerning the handling of the due process claims, they do not rise to the level of reversible error. The violation of plaintiffs' First Amendment claims found by the jury supports the verdict, could not have been cured by due process, and therefore any confusion by the jury on these instructions would not affect the money judgments entered in this case.

Qualified Immunity

Lumley argues that there was no clearly established law proscribing his actions and that the district court erred in submitting to the jury the question of his qualified immunity. In the series of special interrogatories submitted to the jury, they were asked:

> 4A. If you have answered any of the questions 1 through 4 [concerning retaliation and deprivation of due process] "Yes," are the defendants entitled to good faith immunity?

As to Lumley, they checked "No."

Lumley is correct that the issue of qualified immunity is a question of law to be determined by the court, not by the jury. *England v. Hendricks*, 880 F.2d 281, 284 n.1 (10th Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990). Nevertheless, the district court's submission of the immunity issue to the jury is not reversible error in this case because the jury answered the question correctly. The court previously denied Lumley's motion for judgment, in effect holding that Lumley was not entitled to immunity as a matter of law. By the time the events in this case took place, the rule was clearly established that political affiliation is not a proper ground for dismissal of employees who perform duties of the type performed by Hogsett and Rewers. *Dickeson v. Quarberg*, 844 F.2d 1435, 1443-44 (10th Cir. 1988). Defendant cites *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992), and *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), as the best cases in support of his position, but these cases concerned events in 1986 and 1987 before this

Court's decision in *Dickeson*. *Dickeson* was decided and established the law prior to the events in this case.

Lumley's insistent reliance on such cases as *Connick v. Myers*, 461 U.S. 138 (1983) (upholding an employee's discharge for publicly airing matters concerning her seasonal employment); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding an Oklahoma Act similar to the federal Hatch Act); *CSC v. Letter Carriers*, 413 U.S. 548 (1973) (upholding the Hatch Act), is simply misplaced. None of their activity, which Hogsett and Rewers alleged was the cause of Lumley's action, occurred while they were employed by Lumley.

AFFIRMED.

Entered for the court

Paul H. Roney
Senior Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DIANA HOGSETT, DANIEL E. REWERS, Plaintiffs - Appellees, v. THE BOARD OF COUNTY COMMISSIONERS FOR HOT SPRINGS WYOMING; DELOYD QUARBERG, Defendants, and JOHN LUMLEY, Defendant - Appellant.	)	No. 92-8014

ORDER
Entered September 30, 1993

Before McKAY, Chief Judge, RONEY*, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

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*The Honorable Paul H. Roney, Senior Circuit Judge, Eleventh Circuit Court of Appeals, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel of judges that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DIANA HOGSETT, Plaintiff, vs. THE BOARD OF COUNTY COMMISSIONERS FOR HOT SPRINGS COUNTY, WYOMING, DELOYD QUARBERG and JOHN LUMLEY, Defendants.	)	No. 91-CV-0069-B
DANIEL E. REWERS, Plaintiff, vs. THE BOARD OF COUNTY COMMISSIONERS FOR HOT SPRINGS COUNTY, WYOMING, DELOYD QUARBERG and JOHN LUMLEY, Defendants.	)	91-CV-0070-B

AMENDED JUDGMENT

(Filed Jan. 10, 1992)

This action came on for trial before the Court and a jury, the Honorable Clarence A. Brimmer, District Judge, presiding. The issues having been duly tried, and the jury having rendered its verdict as follows:

The jury found that defendant John Lumley did retaliate against plaintiffs Dan Rewers and Diana Hogsett for exercise of their constitutionally protected rights, but that defendant Deloyd Quarberg did not so retaliate against plaintiffs (Special Interrogatories 1 and 2). The jury also found that defendant Lumley denied due process of law to both plaintiffs, while defendant Quarberg did not deny due process to the plaintiffs (Special Interrogatories 3 and 4). The jury denied that Lumley was entitled to good faith immunity (Special Interrogatory 5).

The jury found that neither defendant denied the plaintiffs any rights protected by the Wyoming State Constitution (Special Interrogatories 5 and 6). In addition, the jury determined that defendants did not discriminate against plaintiff Hogsett on the basis of her gender, nor did either defendant breach any contract or agreement with either plaintiff by promissory estoppel (Special Interrogatories 7, 8, and 9). The plaintiffs were not awarded compensation for "on-call" time under the Fair Labor Standards Act (Special Interrogatories 10, 11, 13 and 15).

The jury awarded damages to plaintiff Rewers against defendant Lumley in the sum of $84,950 (Special Interrogatory 12). Plaintiff Hogsett received $32,600 against Lumley (Special Interrogatory 14). The Court granted a directed verdict in favor of the Board of County Commissioners, which should receive its costs herein, as should the defendant Quarberg.

IT IS THEREFORE

ORDERED AND ADJUDGED that the plaintiff, Daniel E. Rewers, recover $84,950 from defendant John

Lumley, together with his costs incurred in this action. It is further

ORDERED AND ADJUDGED that the plaintiff, Daniel E. Rewers, recover nothing from defendant Deloyd Quarberg. It is further

ORDERED AND ADJUDGED that the plaintiff, Diana Hogsett, recover $32,600 from defendant John Lumley, together with her costs incurred in this action. It is further

ORDERED AND ADJUDGED that the plaintiff, Diana Hogsett, recover nothing from defendant Deloyd Quarberg. It is further

ORDERED AND ADJUDGED that as of the close of the plaintiffs' case, the Board of County Commissioners is dismissed and shall receive its costs herein, and that the defendant Deloyd Quarberg should be awarded his costs herein.

Dated this 9th day of January, 1992.

/s/ Clarence A. Brimmer
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

(2)

Supreme Court, U.S.
FILED
JAN 10 1994
OFFICE OF THE CLERK

No. 93-930

In The

Supreme Court of the United States

October Term, 1993

JOHN LUMLEY,

Petitioner,

vs.

DIANA HOGSETT and DANIEL REWERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK E. HACKER
Counsel of Record for Respondents
2515 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 778-8844

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondents, Diana Hogsett and Daniel Rewers, respectfully pray this Court deny the request of John Lumley to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 27, 1993, affirming the judgment of the United States District Court for the District of Wyoming entered upon a jury verdict.

MISSTATEMENT OF FACTS AND OMITTED FACTS WHICH BEAR UPON THE PETITION

Respondents respectfully submit to the Court factual matters which greatly change the nature of the arguments raised by the Petitioner.

Page 3 of the Petition states, "Rewers remained as the Sheriff's second-in-command in the department." While the statement was true for a period time, it is incorrect as it relates to the date on which the employment was lost. After the November, 1990, election, Quarberg ordered a reorganization of the sheriff's office, essentially allowing John Lumley to become the chief administrator and Lumley's designated future undersheriff to be his assistant. At that time, Rewers was removed of all administrative and supervisory authority and reassigned with the duties of a street deputy. Thus, Rewers' authority at the time of his discharge in January of 1991, when Lumley officially took office, was that of a street deputy. He had absolutely no policy-making or supervisory authority whatsoever. His responsibilities included making police patrols, enforcing the laws of the state, and following any orders or policies promulgated by his superiors. He reported his location and activity every 30 minutes to a dispatcher.

Rewers, prior to the discharge decision, had orally and in writing communicated to Lumley that he accepted the results of the election and would work cooperatively for Lumley. Lumley admitted in testimony that he had appropriate means to discharge or discipline Rewers in the event Rewers failed to carry out his job responsibilities, including any failure to abide by departmental policy. Rewers was a highly qualified street deputy whom the former sheriff, Quarberg, described as being "the best street deputy" he had ever seen.

While the Petition for Certiorari attempts to give the impression that the decision to terminate Rewers was related to his status as a candidate, that is a legal argument which does not match well with the facts of the case. Lumley testified that when he chose which deputies would continue in the department, he did *not* consider whether the individuals had been a candidate in the past, and he did *not* have any concern as to whether any of the employees might potentially be political candidates in the future. He did, however, admit that his criteria for continued employment was whether the employees were "personally loyal" to Lumley.

Lumley's complaints about Rewers' personal loyalty related to Rewers' exercise of free speech occurring long before Rewers became a candidate. In December, 1988, Quarberg received a routine citizen's complaint regarding a disagreement over the manner in which Rewers had conducted an investigation of a trespassing incident. At the same time, Quarberg received a complaint from Lumley that Rewers had been heard "bad mouthing" the Sheriff in the community. At that point, the investigation

concentrated on instances where Rewers had publicly criticized the Sheriff.

Lumley's complaint to the Sheriff about Rewers' speech occurred fourteen months prior to Rewers' January, 1990, announcement of a candidacy. The "bad mouthing" consisted of Rewers answering questions raised by citizens regarding his understanding of the reasons for certain actions of the Sheriff. Members of the community were aware of the acquisition of several large trucks which were believed to be fuel inefficient and limited in their usefulness. When the issue was raised Rewers agreed with those who were critical of the purchase. The sheriff's office participated in a state-organized drug task force involving combined resources of the state, county and municipal governments. Despite participation in that team activity, the department also conducted its own investigations. Rewers expressed opinions that such decisions were a duplication and waste of taxpayer money. Rewers likewise, acknowledged expressions of concern by citizens that being sheriff should be a full-time job. (Sheriff Quarberg was operating a farm while also serving as sheriff.)

These communications were made to members of the public in the context of community discussion of matters relating to the Sheriff's Department. It was never contended that such discussion compromised any investigation or other activity of the department. Even after Quarberg became aware that Rewers had expressed such opinions, the evidence demonstrated that the parties were still able to carry out the functions of the department.

When Rewers heard of the Sheriff's investigation, he arranged a meeting with the Sheriff using the assistance of the departmental chaplain, Reverend Parmater. During that meeting, the Sheriff eventually acknowledged the existence of the investigation, but insisted he would investigate anybody he wanted, at any time, for anything. Reverend Parmater specifically raised the question as to whether or not their differences would compromise their ability to work together in the department. Both men agreed that despite any differences of opinions, they were professional law enforcement officers who would continue to do their jobs.

The Petition fails to mention the Plaintiff's contention that the discharges of Rewers and Hogsett occurred in the context of a series of actions which have the effect of benefiting political supporters of Lumley and punishing employees who supported other candidates. The argument presented by the Plaintiff was not geared to the question of whether Rewers had been a candidate per se, but rather to the fact that political supporters were rewarded with positions, while those who supported other candidates lost their positions.

In the "reorganization" accomplished by Lumley, four employees lost jobs. All four had failed to support Lumley in the election. Diana Hogsett was known to be a close friend of Dan Rewers and had told John Lumley she was not going to vote for him. Richard Fairburn, a deputy who defeated Quarberg in the primary and opposed Lumley in the general election was also discharged. Mark Nelson, who had been a political supporter of Richard Fairburn, also lost his position. Rewers, who opposed Lumley was discharged. Four political supporters already

employed by the department received new benefits. Larry Mason was promoted to Undersheriff. Robert Phetteplace was promoted to an investigator. Cali Walker was promoted to jail supervisor. Cindy Magelky was given a salary raise.

Lumley hired Mike Raymond, his campaign chairman, to replace Dan Rewers even though Raymond was not certified as a police officer in Wyoming. Reba Odde, who had no experience with law enforcement, but had been a Lumley campaign contributor and political supporter, was hired into a new part-time secretarial job. The duties of that position were transferred from the position that was previously held by Diana Hogsett. John Black, who was not certified and had no law enforcement experience, but had been a Lumley campaign committee worker, was hired for a deputy position in the jail – the same position which Hogsett had earlier sought by a transfer. During the election, Lumley had declared that he had no problem with Diana Hogsett being transferred to that position, but after the election, he first declined to approve such a transfer and later discontinued Hogsett's employment entirely.

The Petitioner's Brief refers to a "reorganization" and gives the impression of an objective legitimate reason for the termination of Diana Hogsett. There was evidence before the jury, however, that the "reorganization" was a pretext for the termination of Hogsett. Diana Hogsett's responsibilities were secretarial, part-time back-up matron, and civil process. Lumley took the same secretarial duties performed by Diana Hogsett, transferred them to a new part-time secretarial position and hired a campaign worker, Reba Odde, to fulfill the new job. He

gave civil process responsibility to Cindy Magelky, another political supporter, providing a salary increase to compensate the additional responsibilities assigned to her. He refused to allow Diana Hogsett to be assigned to a vacant matron position in the jail. He likewise, declined to consider her for a second jail position which became available. Instead, he hired untrained, uncertified political supporters. Lumley admitted that the sheriff's office was obligated to purchase uniforms and to pay for training for the political supporters who were hired with the result that any ostensible savings from the abolition of Diana Hogsett's position were canceled by new costs.

The Petition also obscures the state law context in which these facts arose. The Petition suggests that Quarberg agreed Rewers and Fairburn could run for office. The Petition also refers to Quarberg's policy as being modeled after the "Hatch Act". The Petition fails to reveal the fact that Wyoming state election laws prohibited employment action against employees who filed as candidates. The evidence was that the Wyoming Secretary of State gave a legal opinion that Quarberg's policy would violate state law. Quarberg's agreement, in reality, amounted to acquiescence to the legal position of the Wyoming Secretary of State. The revised policy permitted employees to run for office, but prohibited disclosure of any confidential law enforcement matter and prohibited campaign activity while on duty.

I. THE PETITION INACCURATELY AND INCOMPLETELY REPRESENTS FACTS AND LAW APPLICABLE TO THE QUESTION OF PROTECTED POLITICAL ACTIVITY.

Page 12 of the Petition includes the following assertion:

> The Court of Appeals' decision in this case is the first to hold that a deputy sheriff has a right, protected by the First Amendment, to run for partisan political office against the sitting sheriff, and that, in practical effect, a newly elected sheriff is constitutionally required to appoint his political opponent as his deputy.

Status as a political opponent was not the pivotal fact in this case. John Lumley testified he never considered Rewers' past or potential future candidacy when he made the hiring decision. Lumley did consider Rewers' exercise of free speech in criticizing then Sheriff Quarberg and then Investigator Lumley, to interested citizens in the context of public discussion. That free speech exercise occurred fourteen months before any candidacy. It was Lumley's complaint about Rewers' free speech that led to Quarberg's "investigation" of Rewers.

Likewise, the Petition disregards the very strong circumstantial evidence of a pattern of employment decisions based on political support. Supporters were rewarded. Employees supporting other candidates were punished.

The argument also inaccurately portrays the Tenth Circuit's position. The argument makes reference to rehiring as a "deputy" and to "sworn deputies". The Tenth

Circuit relied squarely on *Dickeson v. Quarberg*. In that case, the Court thoughtfully discussed the appropriate measure of whether political activity by employees of a sheriff's office is constitutionally protected. The Court specifically rejected an analysis where the constitutional parameters were measured by a mere *title* in favor of an analysis of the employees' actual responsibilities and the necessity of political loyalty to perform those job functions.

The evidence was undisputed that at the time of the adverse decision by Lumley, Rewers had been reduced to the level of a patrol deputy with no policy-making or supervisory authority. At trial, Lumley was unable to explain why partisan political loyalty was necessary in order to carry out the routine functions of a police officer on the street. Petitioner cites *Elrod v. Burns*, 427 U.S. 347, 367 (1976) for the concept that public employers have an interest in political loyalty "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration". Lumley at trial acknowledged that Rewers had been cut out of all policy-making under the Lumley administration. He further acknowledged that if Rewers failed to follow any policies, ample provisions for discipline and discharge were available.

The Petition also inaccurately represents facts and law as they apply to Hogsett. Page 5 of the Petition represents that Hogsett told Lumley she was supporting Rewers "because she felt Lumley *was not qualified* to hold the office of sheriff". Page 13 of the Petition refers to "one who had expressed no confidence in his ability to hold office . . . " and asserts that Hogsett took the position

Lumley was "unqualified" to be sheriff. The actual statement by Hogsett, found at page 451(b) of Appellant's Appendix in the Tenth Circuit is significantly different. Hogsett testified she approached Lumley and informed him "that while he was my friend, I believed Dan was *more qualified* to be sheriff and that's who I would be supporting". Testimony by both Hogsett and Lumley was that they had a friendly and positive working relationship prior to that time. Lumley's testimony as to alleged reasons for her loss of employment related to "reorganization" and alleged excessive coffee breaks, *not* to any opinion on Lumley's qualifications.

The Petition also inappropriately attempts to analogize these facts to "Hatch Act" cases. (Petition pp. 12, 16) Both the district judge and the Tenth Circuit rejected the "Hatch Act" arguments as inapplicable to these facts. This case was not about an established regulation prohibiting certain specific kinds of political activity, but rather retaliation for employees engaging in political activities which were not only accepted, but legally protected as a matter of state law. Petitioners' Brief below acknowledged that the Wyoming Secretary of State had obtained an opinion from her counsel that Quarberg's political activity policy violated the State Election Code. The Brief recites at page 9 that:

> On July 19, 1990, the Secretary of State wrote to Quarberg, enclosing the opinion, stating that 'the policy is a clear violation of W.S. 22-26-119'.

Quarberg thereafter rescinded the prohibition and adopted a new procedure expressly authorizing such political activity. Nothing in the "Hatch Act" line of cases

justifies punishing employees who do not support a sitting sheriff in the context of a state legal system which permits and protects both political support and candidacy.

The failure of the Petition to accurately reflect the factual context of the speech and political support is compounded by failure to fully present the jury instructions given by the court. Petitioner suggests at page 15 that the Court of Appeals "failed to recognize or improperly applied . . . " the requirement to balance the employees' interest in speech against the employer's interest in business efficiency. A review of the jury instructions approved by the Tenth Circuit opinion demonstrates that all of the respective free speech considerations were appropriately applied.

Jury Instruction No. 7 placed the burden of proof on the Plaintiff to prove that retaliation occurred "because of his utterance of the protected speech, rather than the speech which was not protected".

Jury Instruction 8 explains that to be protected, the speech would have to relate to a matter of public concern. The Court in its instruction, observed that "when the speech is a matter of public concern, then this Court must balance the interest of a public employee when commenting on such matters and the interest of the employer in promoting the efficiency of its public services." The instruction further explained:

> In focusing on the effective functioning of the employer's enterprise, this court considers whether the statement impairs discipline by superiors, harmony among coworkers, has a

detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operations of the employer.

Within that, weighing these factors, the court finds that any speech of Plaintiff Rewers to members of the public regarding the failure of the Sheriff to be actively involved in the operations of the department, the duplication in effort involved with the drug task force and the Sheriff's Department, the fitness of the Sheriff's Department personnel to perform drug investigation activities, and the purchasing practices of the sheriff's office, including the purchase of vehicles, was constitutionally protected in this situation. All of the communication between Plaintiff Rewers and the Secretary of State are constitutionally protected. Statements of Plaintiff Rewers during the course of or in relationship to a political campaign regarding the performance or fitness of Sheriff Quarberg or the performance or fitness of Defendant Lumley are constitutionally protected.

What is not constitutionally protected is mere personal sniping or carping done for the sole purposes of complaining without an intent to influence a change in practice, policy or behavior. Speech comprising personal complaints of Dan Rewers, which related to matters of personal significance to Mr. Rewers are not constitutionally protected.

It is clear from the face of these jury instructions that the Court applied the prevailing constitutional doctrine excluding speech that was not of a public interest and

balancing the employee's right to speak against the employer's need for efficiency and harmony of operation. The District Court struck the balance at protecting speech referenced above, but excluding "personal complaints of Dan Rewers" and "merely personal sniping or carping". The instruction, thus, excluded the speech referenced on page 14 of the Petition to the effect that Rewers allegedly referred to Quarberg around the office as "an idiot" or "a son-of-a-bitch". Such statements were deemed *not* to be protected under the clear language of the Court's ruling and jury instructions. The judge clearly instructed the jury in regard to the Defendant's theory on that matter:

> On the other hand, Defendants Quarberg and Lumley alleged that they objected to Rewers' speech, which was not of public concern, but rather for his personal interest. They alleged Plaintiff Rewers engaged in personal attacks against Defendant Quarberg and that it was his later speech they found to be inappropriate.

The same instruction, no. 11, further states that when an employee "speaks as an employee on matters of only personal interest or personal gain, the speech is not protected". The instruction clearly indicated that it was the Plaintiff's burden to prove retaliation for the "protected speech, rather than the speech which was not protected".

In addition to distinguishing between protected and unprotected speech and balancing the employer's interest in efficiency, the Court provided specific further direction in relationship to political expression and association. The Court instructed the jury that:

> Where it is asserted that effective government requires the discharge or discipline of

> employees on the basis of their particular political association, expression or support, it is the Defendants' burden to prove that such loyalty was an appropriate requirement for the effective performance of the public office.
>
> The government must demonstrate an overriding interest in order to justify such actions. If the government has open to it a less drastic way of satisfying its legitimate interest, it may not choose actions that broadly stifle the exercise of fundamental personal liberties. The government must demonstrate that other less intrusive means to provide for effective government will not work. When there are doubts as to whether the government has shown its compelling interest, the case should be resolved in favor of the Plaintiffs.

The jury, the District Court and the Tenth Circuit all reached the conclusion that the Defendants had failed to demonstrate a need for political loyalty in the job responsibilities which were performed by these Plaintiffs. Quarberg agreed that throughout the time period these issues evolved, no situations occurred where investigations weren't performed, individuals were not incarcerated, documents and reports were not prepared, or any other significant failure to perform duties occurred. While there was disagreement among members of the office, that appeared to be based more on Sheriff Quarberg's personality and management style than any political campaign. One witness, Cindy Magelky an employee who testified she disliked Dan Rewers because of a personal disagreement unrelated to politics, documented the conversations and activities of Rewers and Hogsett with 200 notes written on sticky pads. At trial she admitted that not one

of her notes recorded a single incident in which a campaign related conversation or activity had occurred at the office. She also did not document any instance of criticism of the Sheriff. Even this most ardent critic of Plaintiff Rewers admitted Rewers performed his job in a professional manner.

During the transition period between the election and the installation of Lumley as sheriff, Rewers communicated directly to Lumley that Rewers intended to fulfill his responsibilities carrying out whatever tasks were assigned to him by Lumley.

II. THE DECISION IS GENERALLY IN ACCORD WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT; DIFFERENT RESULTS IN CIRCUITS ARE LARGELY DRIVEN BY FACTUAL DIFFERENCES.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held that employees of the Cook County Illinois Sheriff's Department could not be replaced because of their political party affiliation unless the employee held a policy-making position. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court further defined *Elrod* emphasizing that the question was whether political affiliations and beliefs are appropriate considerations for the effective performance of the public employees' duties. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), this Court held that public employee promotions, transfers and recalls after a lay-off could not be based upon political affiliation. In *Francia v. White*, 594 F.2d 778 (10th Cir. 1979), the Tenth Circuit held that deputy sheriffs in nonpolicy-making

positions who are adequately performing their jobs were protected under *Elrod*. After this Court decided *Branti* the Tenth Circuit followed this Court's ruling in *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988).

Dickeson expressly followed *Branti* holding that a determination whether an employee of a sheriff's office can be discharged for political reasons turned upon a factual review of the employee's job responsibilities, rather than reference to an employee title. Thus, in *Dickeson* the Court reviewed the specific job responsibilities in determining the appropriateness of a political test for employees. When the Tenth Circuit reviewed this case, the Court directly applied *Branti* and *Dickeson* to the facts of this case.

It is critical to remember that Diana Hogsett was never a political candidate. At most, her political activity consisted of expressing a verbal preference for Dan Rewers and placing a yard sign at her house. Thus, none of the argument about the status of a political candidate or active political support even apply to Hogsett. Her job responsibilities are indistinguishable from employees found protected from *Elrod*, *Branti*, and *Rutan*.

As to Dan Rewers, the argument about the protected nature of candidate status does not correlate with the facts of this case. The evidence does not factually support the legal argument which Petitioner seeks to have this Court review. The case arose in a factual context of the promotion of supporters, the hiring of former campaign workers, and the dismissal of four employees who had supported other candidates. Lumley did not single out prior or possible future candidacy as any basis for his

decision. The results of his actions show a pattern of benefiting supporters and punishing those who opposed him. At the time of the election, Lumley was not the sitting sheriff, but rather was one of Rewers' fellow employees who also chose to run for office.

Petitioner's argument appears to be that there is something magic about the title of Deputy Sheriff which somehow obviates any closer analysis of the actual functions of the job. The Petition emphasizes the small nature of the Sheriff's Department and references "trust" and "confidence". To the extent those arguments are based upon concepts embodied in *Connick v. Meyers*, 461 U.S. 138 (1983) or *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court appropriately examined the facts of this situation including issues of working relationship and disruption, concluding that, on balance, the speech was protected. Reviewing the same facts, the Tenth Circuit upheld the Court's free speech balancing.

To the extent that the argument seeks to create some kind of per se rule that deputy sheriffs in small departments are never protected from political affiliation requirements, that argument is inconsistent with this Court's established law. In *Branti*, this Court reviewed a nine-person Public Defender's Office (smaller than the sheriff's office in this case). The *Branti* emphasis was upon the extent to which the discharged employees engage in policy-making related to "partisan political interests" and have access to confidential information "bearing whatsoever on partisan political concerns". *Branti*, 445 U.S. 519. *Branti* flatly rejected any general notion that mutual trust and confidence would exist only between members of the same political party in an

agency of small size. *Id.* at 520 n.14; *Jones v. Dodson*, 727 F. 2d 1329 (4th Cir. 1984); *Burns v. County of Cambria, PA*, 971 F.2d 1015 (3rd Cir. 1992).

While there are cases cited by the Defendant holding that the nature of the job of Deputy Sheriff justifies a political support test, those cases are not necessarily inconsistent with this one. In, *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), the Plaintiff in that case, unlike Rewers, supervised fifteen deputies and was involved in confidential political conversations with the sheriff. In fact, Joyner broke a political confidence of the sheriff reporting the sheriff's political plans to his opponent. Rewers was not a supervisor, was not privy to Lumley's political plans, and was not accused of breaking any confidence relating to any partisan matter.

Other circuit cases reach a different result based upon the negative effect of specific statements made in a campaign. *Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988). In other cases, a Court reviewing the function of deputies within a specific state have found needs for political loyalty.

It is dangerous and erroneous to assume that the responsibilities of deputy sheriffs in respective jurisdictions are identical. It is also inappropriate to assume that state law provisions regarding participation in the electoral process are the same. The district judge, the jury, and the 10th Circuit have effectively determined that the job duties of a deputy sheriff in Wyoming are not such that partisan political loyalty is required. State law as applied by the Secretary of State recognized the right of

deputy sheriffs to run for office without adverse employment consequence. It, therefore, should not be surprising that the district judge, the jury and the 10th Circuit on review, all agreed that the nature of Dan Rewers' responsibility in Hot Springs County, Wyoming, did not require his personal political loyalty to John Lumley. There is a split in the circuits only when those circuits are reviewing the identical issue. In this case, both the factual and legal context can be distinguished from the other cases.

III. THE COURT OF APPEALS CORRECTLY APPLIED THE DOCTRINE OF QUALIFIED IMMUNITY.

Defendant's argument about qualified immunity is largely premised on its misstatement of the facts of the case as a pure issue of the protection for a candidate. As referenced, Hogsett was never a candidate, and Rewers' candidacy per se was never asserted to be the basis for the termination by Lumley. The case was a free speech case and political support case. The free speech related to matters predating any candidacy status and political loyalty related to the wholesale political benefit of supporters.

The suggestion that the law was not decided sufficiently to hold Lumley liable in his individual capacity ignores the clearly established precedent of both this Court and the Tenth Circuit, which preceded the Defendant's actions. *Elrod, Branti,* and *Rutan* were all decided prior to the facts of this case. The Tenth Circuit has specifically applied the doctrine to deputy sheriffs in *Francia v. White, supra,* in 1979 and to this same sheriff's

office in Hot Springs County, Wyoming, in *Dickeson, supra,* in 1988. Lumley testified he was aware of the *Dickeson* decision and that he believed it would have been improper to dismiss any of the employees for their political support or activity. Lumley was not a poor public official exercising discretionary decision-making authority in an area where the legal principles were unclear. To the contrary, the principles were well established. They had been established and applied to this same sheriff's office in Wyoming. Lumley knew and recognized those rules.

CONCLUSION

Plaintiffs respectfully request this Court deny Defendants' Petition for Certiorari.

DATED this 10th day of January, 1993.

Respectfully submitted,

PATRICK E. HACKER
(Attorney of Record)
2515 Pioneer Avenue
Cheyenne, Wyoming 82001